

2013 IL App (1st) 120430-U

SIXTH DIVISION
September 30, 2013

No. 1-12-0430

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

VIRGINIA BRANDT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	
HOLY CROSS FAMILY MEDICAL CENTER)	
63RD STREET, a corporation, HOLY CROSS)	
FAMILY MEDICAL CENTER CHICAGOLAWN,)	
a corporation, FAUSTO R. LORA-MIR, M.D.,)	No. 2006 L 2788
EMERGENCY ROOM CARE PROVIDERS, S.C.,)	
a corporation, ALLEGRETTI RAZIU, Also Known)	
as Emergency Room Physician No. 8035,)	Honorable
THEODORE, M.D. and CONSTANTINE J.)	Elizabeth M. Budzinski,
TATOOLES, M.D.,)	Judge Presiding.
)	
Defendants)	
)	
(Holy Cross Hospital, Robert F. Yario, M.D. and)	
Robert F. Yario, M.D., Ltd., a corporation,)	
)	
Defendants-Appellees).)	

PRESIDING JUSTICE HALL delivered the judgment of the court.

Justices Lampkin and Hyman concurred in the judgment.

ORDER

¶ 1 **Held:** The judgment for the defendants in a medical malpractice case was affirmed; the judgment was not void, the jury's verdict was not against the manifest weight of the evidence and the plaintiff forfeited her claim that the denial of her motion *in limine* was error.

¶ 2 The plaintiff, Virginia Brandt, filed a medical malpractice complaint against the defendants, Holy Cross Hospital (Holy Cross), Robert F. Yario, M.D., Robert F. Yario, M.D. Ltd. (collectively Dr. Yario).¹ The jury found in favor of Holy Cross and Dr. Yario and against the plaintiff. The plaintiff's posttrial motion was denied, and she filed a notice of appeal.

¶ 3 On appeal, the plaintiff contends that: (1) the judgment was void; (2) the verdict was against the manifest weight of the evidence; and (3) the denial of the plaintiff's motion *in limine* to bar evidence of the plaintiff's unrelated illnesses was error. The plaintiff further contends that if she is awarded a new trial as to Dr. Yario, she must also receive a new trial as to Holy Cross. For the reasons set forth below, we affirm the judgment in favor of Holy Cross and Dr. Yario.

¶ 4 Initially, we observe that the plaintiff's appellant's brief does not conform to the requirements of Illinois Supreme Court Rule 341(h)(9) (eff. Feb. 6, 2013)). Rule 341(h)(9) directs that the appellant's brief contain an appendix "as required by Rule 342." Rule 342 provides in pertinent part that the appendix must include "a complete table of contents, with page references, of the record on appeal. The table shall state: *(3) the names of all witnesses and the pages on which their direct examination, cross-examination, and redirect examination begin." Ill. S. Ct. R. 342(a)(3) (eff. Jan. 1, 2005). In this case, the appendix to the plaintiff's appellant's

¹The other named defendants were dismissed from the suit and are not parties to this appeal.

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brief does not contain the names of the witnesses and the page references where their testimony is found.

¶ 5 Where violations of appellate procedural rules do not interfere with or preclude meaningful review of the merits of the case, we will not impose the harsh sanction of striking the offending brief. Nonetheless, we remind appellate counsel that our supreme court rules governing appellate practice are not suggestions; "[a] lawyer who ignores them casts doubt on his skills and casts a shadow over the merits of his client's case." *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 52 (2004).

¶ 6 BACKGROUND

¶ 7 I. Proceedings Below

¶ 8 On March 15, 2006, the plaintiff filed a complaint for medical negligence against Holy Cross and Dr. Yario. She alleged that while she was a patient at Holy Cross, Dr. Yario's acts of medical negligence resulted in the above-the-knee amputation of her left leg. She further alleged that Dr. Yario was an actual agent and/or apparent agent and employee of Holy Cross.

¶ 9 Dr. Yario died on November 15, 2010. On January 14, 2011, the trial court granted Dr. Yario's attorneys' motion to spread his death of record. On March 4, 2011, probate division Circuit Court Judge Susan M. Coleman entered an order appointing attorney Irving Stenn the independent administrator of the Estate of Robert Yario. On March 10, 2011, law division Circuit Court Judge William Maddux entered an order appointing Margaret Yario (Dr. Yario's niece) special administrator of the estate of Dr. Yario and terminating the appointment of attorney Stenn as the independent administrator.

¶ 10 Prior to the commencement of the jury trial, the trial court ruled on the parties' motions *in limine*. The defendants objected to the plaintiff's motion *in limine* barring any reference to her unrelated medical history and treatment. While the trial court denied the plaintiff's motion, the court instructed the defendants that they could use the plaintiff's unrelated medical history and treatment to argue life expectancy but not to argue causation. The court then stated as follows:

"I'm going to deny this and you raise it at trial. I think the defense understands how they can use it. Okay? And when you prepare it for the witness, if you see something and you want to talk about it before the witness gets on the stand, we can do that."

¶ 11 II. Jury Trial

¶ 12 The trial in this case began on March 11, 2011. The pertinent testimony is summarized below.

¶ 13 Plaintiff Virginia Brandt

¶ 14 The plaintiff was 65 years of age at the time of trial and had been employed as a factory worker. She acknowledged she had health issues over the years, but she was in good health in March 2004. Sometime in March 2004, the toes on her left foot began to ache. Between March 21 and 22, 2004, the plaintiff went to Holy Cross twice. Dr. Lora-Mir, the emergency room doctor, diagnosed arthritis and referred her to a rheumatologist. By March 23, 2004, the pain was worse, and she went to the emergency room at Holy Cross where she was admitted. The plaintiff signed consent forms but did not read them. Although she had been given morphine, she recalled meeting Dr. Yario prior to surgery. She assumed that Dr. Yario was employed by Holy Cross because he was taking care of her. Following the surgery, Dr. Yario spoke with her, but she did

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not remember what he said.

¶ 15 Following the surgery, the plaintiff had an open wound on her left leg from the incisions made to prevent swelling in the leg. The plaintiff experienced intense pain in her left leg. Subsequently, a doctor, whose name she could not recall, told her that her left leg had to be amputated. She signed a consent for the amputation surgery, which was performed at the beginning of April 2004 by Dr. Ignus Lubinowskus. It was the plaintiff's decision to have the amputation above the knee rather than below the knee to avoid having to undergo a second procedure.

¶ 16 On cross-examination by Dr. Yario's attorney, the plaintiff acknowledged that at the time she was hospitalized at Holy Cross, she had been on disability for 10 years due to arm problems. She also suffered from high blood pressure and had suffered both a stroke and a heart attack. She also had emphysema.

¶ 17 The plaintiff recalled Dr. Yario telling her that if she had come to see him four or five days earlier, he could have saved her leg. She denied that the doctor told her he did not think her leg could be saved. The plaintiff did not acknowledge her deposition testimony wherein she stated that Dr. Yario told her he could not save her leg.

¶ 18 On cross-examination by Holy Cross' attorney, the plaintiff identified consent forms that she had signed for previous procedures at Holy Cross. She acknowledged that the consent forms stated that Holy Cross used independently-contracted physicians to conduct examinations and procedures and that these physicians were not employees of Holy Cross. She further acknowledged that by signing the form she agreed that she had read the entire consent form and

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that she fully understood it. Because she had been given medication, her son, Paul, signed the consent for the surgery performed by Dr. Yario.

¶ 19 Dr. Robert F. Yario

¶ 20 Prior to his death, Dr. Yario's discovery deposition was taken by the plaintiff on April 1, 2008. At trial, the parties agreed to have his deposition testimony read into the record. Dr. Yario testified as follows.

¶ 21 At 2 a.m. on March 24, 2004, Dr. Yario received a telephone call from the Holy Cross emergency room. He was informed that the plaintiff was 58 years of age and complained of a painful foot for the last seven days. Dr. Lora-Mir had referred the plaintiff to Dr. Tatooles, but he could not be reached. Dr. Yario ordered an arteriogram² for the plaintiff and for Dr. Tatooles to be contacted. In the event, Dr. Tatooles could not be reached, the emergency room staff was to call Dr. Yario back. He did not receive any further calls regarding the plaintiff.

¶ 22 When Dr. Yario arrived at Holy Cross later that morning, Dr. Tatooles was still not available, and he was asked to see the plaintiff. He examined the plaintiff between 7 a.m. and 8 a.m. His examination of her left leg revealed no pulses at the knee or below the knee. Her left foot was cold and painful but not paralyzed. Because the plaintiff was still able to move her foot, there was some hope that the somatic nerves that supplied the voluntary muscle movement were not hypoxic.

¶ 23 Learning that the angiogram he had previously ordered for the plaintiff had not been

²The terms "arteriogram" and "angiogram" denote the same procedure, and both terms appear in the record on appeal. For consistency, the term "angiogram" will be used.

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performed, Dr. Yario immediately ordered one. However, the plaintiff's angiogram was delayed until 11 a.m. due to another patient's cardiac arrest in the angiogram suite.

¶ 24 The angiogram revealed that there was a normal flow of blood through the arteries on the right leg but a total obstruction just above the knee on the left leg. Dr. Yario believed the left leg was in jeopardy because the angiogram did not reveal any target blood vessels. Even with no target vessels, based on his experience, Dr. Yario decided to perform surgery in order to locate a vessel to plug into; otherwise, an immediate amputation of the plaintiff's left leg would be required. Based on absence of paralysis, the doctor believed there was some hope. Dr. Yario explained to the plaintiff's family that while there was a high chance the leg would be lost, in some cases, opening up the leg revealed runoff or blood flow into arteries not shown on the angiogram.

¶ 25 From his post-operation notes, Dr. Yario explained that at the area of the knee, he opened up the artery and removed the blood clots with a balloon catheter, known as a Forgarty catheter. He obtained a good blood flow to the popliteal artery but then had difficulty moving the catheter distally. When it did move, he was able to remove multiple clots from the next area. An angiogram was performed showing a dissection in the peroneal and the distal popliteal artery. The dissection obstructed the vessel, so he had to proceed further down. He increased the incision and dissected out the combined posterior tibial and peroneal artery. The doctor harvested the saphenous vein from the leg and performed a bypass from the area of the knee to the mid-calf. He then performed an anastomosis.³ There was good blood flow to the distal end of the

³An "anastomosis" is defined as "the union of artery and vein or the rejoining of branches

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anastomosis, basically the mid-calf area, but there was no Doppler pulse. Another angiogram was performed which showed that the posterior tibial artery was still dissecting. Using more of the saphenous vein, he extended the bypass down to the ankle. He noted that there was a good blood flow and there was a Doppler pulse in the posterior tibial artery. The doctor then performed bilateral fasciotomies as a precaution. Although the left leg was not especially swollen, the plaintiff experienced seven days without good blood flow and had undergone four hours of surgery.

¶ 26 Dr. Yario did not recall whether he had done a completion angiogram. He did have a good Doppler pulse which was much better than an angiogram. He could have a good angiogram but no pulse, in which case he would have to go further down in the leg. With the Doppler pulse, he was able to determine that the plaintiff was getting blood flow into her foot from the posterior tibial; one open artery was necessary to save her foot. At the conclusion of the procedure, he believed that the left foot was better.

¶ 27 After the surgery, Dr. Yario felt that to do more might harm the plaintiff; it was necessary to monitor the leg but, at that point, either the leg was saved or it was not. He continued to follow the plaintiff's progress until she underwent the surgery to amputate her leg. Dr. Yario opined that the plaintiff's leg was lost because there were too many small blood clots and that her foot was lost even prior to the surgery.

of a common vascular trunk to form a network by which the circulation of a part is maintained when the usual channel is obstructed (as by ligature or a thrombus). Webster's Third New International Dictionary 78 (1981).

¶ 28

Preston Flanigan, M.D.

¶ 29 Dr. Flanigan, a board-certified vascular surgeon, was the plaintiff's expert witness on causation. His educational background included a residency at St. Joseph's Hospital in Ann Arbor, Michigan and a year of training in vascular surgery at Northwestern Memorial Hospital. He was on the faculty of the University of Illinois where he set up the division of vascular surgery, and he published numerous articles in the area of vascular surgery. At the time of trial, he practiced in California and was the director of vascular services at St. Joseph's Hospital in Orange County.

¶ 30 Dr. Flanigan explained that the blood flow to the leg is what keeps it alive; if the flow is stopped, the leg will die. The blood flow to the leg begins at the heart and divides into arteries, which in turn divide into branches and become increasingly smaller until the capillaries are reached. There, nutrients are exchanged between the blood vessels and the cells of the tissue.

¶ 31 In the plaintiff's case, there was a large clot positioned right above where the aorta divided into the right and left leg arteries. The clot did not completely block the aorta; there was still blood flow getting around it. Pieces of the clot had broken off and moved down the arteries until they lodged in a blood vessel too small to pass through. In the left leg, the profunda artery was completely cut off by a clot, and the superficial femoral artery was completely blocked above the knee.

¶ 32 Dr. Flanigan agreed that the applicable standard of care was what a reasonably careful, reasonably qualified vascular surgeon would do or not do under the same or similar circumstances. Dr. Flanigan opined that Dr. Yario deviated from the standard of care by not

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prescribing heparin when he was first contacted by the emergency room staff. The fact Dr. Yario ordered an angiogram indicated he had been given enough information to know that it was a vascular surgical emergency. Heparin would have kept the blood from further clotting, which happens when the blood flow to the artery is slowed. The failure to order heparin contributed to the plaintiff's injuries. Dr. Yario further deviated from the standard of care when he failed to order heparin for the plaintiff after his physical examination of the plaintiff confirmed his diagnosis.

¶ 33 Dr. Flanigan agreed with Dr. Yario's decision to perform the surgery on the plaintiff and to administer heparin at that time. The angiogram that was performed during the surgery showed a dissection in the peroneal and distal popliteal artery, indicating a break in the wall of the artery. Such a break could be caused by the catheter being pushed at the wrong angle and would have complicated the procedure. After he completed the bypass, Dr. Yario did not run the catheter down to the left ankle and then up arteries pulling the cots down. There was a good chance that the arteries were not cleaned out enough to accept the blood flow preventing the blood from reaching the foot.

¶ 34 Dr. Flanigan found Dr. Yario's finding of good blood flow but no Doppler pulse to be contradictory; no Doppler pulse would indicate the blood was not flowing. The next angiogram revealed that there was still a dissection below the bypass that could cause a blockage. The medical records did not confirm Dr. Yario's deposition testimony that he did a second bypass down to near the ankle.

¶ 35 Dr. Flanigan opined that Dr. Yario deviated from the standard of care when he failed to

do a completion angiogram. From a completion angiogram, the doctor could see if there were enough open vessels for the blood to flow down to the foot and save the lower leg and foot, indicating that the bypass graft had been done correctly. If not, the doctor would go back in and try other ways to remove the clots. This deviation contributed to the plaintiff's injuries. While the plaintiff was in the recovery room, there was no sound of blood flowing in the posterior tibial artery, and the faint signal from the dorsalis pedis disappeared. This indicated that there was no blood flow to the ankle or top of the foot. The lack of the Doppler signal in the recovery room indicated either the bypass was not working because the blood was flowing only to the point of the clot, or the bypass was working, but the blood was going to the upper calf tissues and back up the leg rather than down to the lower leg and the foot. If Dr. Yario had done the completion angiogram and saw an insufficient blood flow, the standard of care required him to perform a retrograde or reverse embolectomy,⁴ *i.e.* move up the leg using the catheter to remove the clots or to bypass through an artery that might be open lower down the leg.

¶ 36 Dr. Flanigan opined that Dr. Yario deviated from the standard of care during the post-operative period when he failed to return the plaintiff to surgery after it was clear, both in the operating room and the recovery room, that there was an insufficient restoration of the circulation to the lower leg and foot to save it. He further opined that since the plaintiff still had motion in her leg, there was still circulation. Had heparin been given timely and the operation performed properly, it was more likely than not the plaintiff's leg could have been saved.

¶ 37 On cross-examination by Dr. Yario's attorney, Dr. Flanigan testified as follows. Even if

⁴The procedure is also referred to in the record as a "thrombectomy."

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Dr. Yario had requested that the plaintiff be given heparin when he was first contacted by the emergency room staff, but performed the surgery in the same way, the outcome would be the same. While using the Forgarty catheter, Dr. Yario injured the inside of the artery. However, a tear in the vessel was an acknowledged risk of the procedure. Dr. Flanigan had no opinion whether Dr. Yario deviated from the standard of care when the injury to the blood vessel occurred.

¶ 38 Dr. Flanigan agreed that Dr. Yario performed a bypass but found no evidence in his post-operation report that he did a second bypass. Dr. Yario did not record that he extended the first bypass, and he did not use the term "bypass." The performance of a bypass would be an important step to note in his operative report. Dr. Yario did not state in what area of the plaintiff's leg he obtained the Doppler signal; it could have been anywhere from just below the knee to just below the ankle.

¶ 39 On redirect examination, Dr. Flanigan reiterated that neither Dr. Yario's post-operation notes nor his dictated post-operation report made any mention of a second bypass being performed. Dr. Yario's post-operation notes did not agree with the drawings he made four years later at his deposition.

¶ 40 Ronald D. Curran, M.D.

¶ 41 Dr. Curran testified as an expert witness on behalf of Dr. Yario. The doctor was board-certified in both general surgery and vascular surgery. He was a graduate of Rush College of Medicine and did a fellowship in cardiovascular and thoracic surgery at Northwestern Medical School, where he also taught. Dr. Curran was a member of several surgical societies including

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the American College of Surgeons and the Society of Thoracic Surgeons and had published books and articles.

¶ 42 Dr. Curran had been on the staff of several local hospitals. At the time of trial, he was on the staff at Swedish Covenant Hospital, where he served as section head of cardiovascular surgery. He also participated in morbidity and mortality conferences where doctors would review cases where complications arose, and discuss what could have been done differently and whether medical literature supported alternative approaches. Vascular surgery represented about 50% of his medical practice.

¶ 43 Dr. Curran opined that there was no standard of care applicable to Dr. Yario's handling of the telephone call from the emergency room; providing information was helpful but did not constitute providing care to the plaintiff. No patient-physician relationship was established at that time. The standard of care did not require Dr. Yario to order heparin for the plaintiff at that time because he was not in charge of her care.

¶ 44 Reviewing Dr. Yario's post-operation report, Dr. Curran explained that, although the first angiogram showed no blood flow through the arteries below the knee, because the plaintiff still had movement in her foot, Dr. Yario was hopeful that there was an artery open below the knee. His surgical plan was to de-clot the artery or locate a target blood vessel to do a bypass or to do both. Dr. Curran opined that Dr. Yario's surgical plan was correct and within the standard of care.

¶ 45 Referring to Dr. Yario's post-operation report, Dr. Yario's attorney questioned Dr. Curran as to Dr. Yario's notation that he had difficulty passing the catheter down the artery and what that

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meant in terms of the clot he was trying to remove. Dr. Curran testified as follows:

***it's somewhat of a blind procedure, so you're using your feedback that you're getting as you're passing this catheter. You want it to go, but obviously you can't - if you push it hard enough, you potentially could just push it right out the side of the blood vessel. And that's happened even to me."

¶ 46 Referring to Dr. Yario's post-operation report wherein Dr. Yario stated that he performed an angiogram which showed dissection in the peroneal and distal popliteal artery, Dr. Yario's attorney asked Dr. Curran to explain to the jury "the section of the artery when using a forward catheter like you see in these upper pictures of 2.1?" Dr. Curran testified as follows:

"So unfortunately the Forgarty catheter, as I just said, it can cause trauma. Besides fixing it properly, it can create problems. I mean, you can perforate a blood vessel with it.

And one of the other things you can do is create an arterial dissection. An arterial dissection basically describes the event that occurs - - the artery is - - the wall of the artery actually is made up of three different layers ***the intima, the media and the adventitia. And because of trauma, you can get a tear in that intima, and then unfortunately with that tear, then you can get what's called a dissection where actually you develop a false lumen. ***.

And as it shows here, you have a true lumen and a false lumen. And unfortunately sometimes, more often or not, the false lumen actually then starts to compress the true lumen. The false lumen ends up being bigger than the true lumen.

So it's really a tearing of the inner layer of the artery with the creation now of two

channels, a true lumen and a false lumen, and then unfortunately further obstruction of the true lumen by this enlarging false lumen."

Dr. Curran opined that Dr. Yario's decision to do an angiogram at that point was based on "the combination [of] the difficulty of passing the catheter and not getting any good blood flow."

¶ 47 Based on the information in the post-operation report, Dr. Curran then explained that on the angiogram, Dr. Yario observed a dissection in the popliteal artery just below where he did his initial embolectomy and that further down below the knee, he observed that the dissection also occurred in the peroneal artery and the distal popliteal. Dr. Yario extended his incision 21 centimeters. After dissecting out the tibial peroneal trunk, Dr. Yario harvested the saphenous vein and did a bypass. There was now good blood flow but no Doppler signal at the ankle, indicating the bypass was not working. Dr. Yario then did an additional bypass to just above the ankle. Dr. Curran acknowledged that in his post-operation report, Dr. Yario did not state what part of the leg was the target of the second bypass. After performing the second bypass, Dr. Yario noted there was good blood flow and a Doppler signal.

¶ 48 Next, Dr. Curran opined that a completion angiogram was not required by the standard of care. In his experience, completion angiograms are not done where the surgeon is satisfied with how the procedure went and the results achieved. A completion angiogram would be called for if the surgeon was concerned with any part of the procedure. The hospital records reflected that there was a Doppler signal detected in the recovery room. Later that night, the plaintiff's internist noted that the plaintiff's toes looked good, and she had sensation and could move her foot. The standard of care for the postoperative period did not require Dr. Yario to take the plaintiff back

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into surgery two to four days later. Dr. Yario's post-operative notes reflected he had gone down the leg as far as he could, and he believed he had done all he could do for the plaintiff.

¶ 49 While Dr. Yario's attempt to save the plaintiff's leg was reasonable, from the point of view of the present time, Dr. Curran opined that, in retrospect, the plaintiff's leg could not have been saved. The doctor based his opinion on the results of the angiogram and the events during the surgery, including the dissection of the blood vessel complication. Dr. Curran further opined that Dr. Yario met the standard of care in treating the plaintiff. Nothing he did or failed to do caused the plaintiff to lose her leg.

¶ 50 On cross-examination by the plaintiff's attorney, Dr. Curran acknowledged that in the absence of a doctor-patient relationship, Dr. Yario should not have ordered the angiogram for the plaintiff, but it was an unusual situation. Since Dr. Yario was not the treating physician, the standard of care did not require him to prescribe heparin at the time he was contacted by the emergency room.

¶ 51 Dr. Curran disagreed with Dr. Flanigan on a number of points. Dr. Curran did not believe that a completion angiogram was required. While an angiogram provides an actual picture, a picture is a static image and shows only that there is blood flow. A Doppler signal gives the surgeon an idea of how good the blood flow is. Dr. Curran agreed that Dr. Yario's post-operation notes did not state that he did a second bypass down to the ankle.

¶ 52 Dr. Curran agreed with Dr. Yario's determination that he had done all he could for the plaintiff. His post-operative notes indicated that Dr. Yario considered but concluded there was nothing more he could do for the plaintiff. Dr. Curran agreed that the recovery room chart noted

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that the Doppler signal Dr. Yario detected on the posterior tibial artery was absent. However, that notation was contradicted by the note on the chart that there was a "fleeting" Doppler signal on the pedal pulse; the posterior tibial is a pedal pulse. Dr. Curran reiterated that Dr. Yario's treatment of the plaintiff complied with the standard of care.

¶ 53 On redirect examination, Dr. Curran explained that moving the catheter up the leg, as Dr. Flanigan maintained Dr. Yario should have done, was not standard practice because the blood vessels located at the ankle are fragile and do not handle a catheter well. Dr. Curran opined that the anesthesiologist's report, which charted the posterior tibial artery bypass, and the 21-centimeter incision mentioned in the pathology report following the amputation of the plaintiff's left leg confirmed Dr. Yario's deposition testimony. The fact that the plaintiff underwent fasciotomy on both sides indicated that the 21-inch incision was due to the bypass not to the fasciotomy. According to the internist's progress note, charted about two hours after the surgery was completed, the toes on the plaintiff's left foot looked good, and the plaintiff had sensation in her foot.

¶ 54 On March 18, 2011, following deliberations, the jury returned a verdict in favor of Dr. Yario and Holy Cross, and against the plaintiff.⁵ The trial court entered judgment on the jury's verdict.

¶ 55 III. Posttrial Proceedings

¶ 56 On July 15, 2011, the plaintiff filed her posttrial motion. The plaintiff sought a new trial

⁵The resolution of the issues on appeal does not require that we set forth the expert testimony related to the issue of damages.

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on the grounds that Dr. Yario's estate was not represented properly in the proceedings, the verdict was against the manifest weight of the evidence and the denial of the plaintiff's motion *in limine* barring references to the plaintiff's previous medical conditions was error.

¶ 57 On January 11, 2012, the trial court issued a memorandum opinion and order denying the plaintiff's posttrial motion. This appeal followed.

¶ 58 ANALYSIS

¶ 59 I. Void Judgment

¶ 60 A. *Standard of Review*

¶ 61 Whether a judgment is void presents a question of law. Therefore, our review is *de novo*. *People v. Rodriguez*, 355 Ill. App. 3d 290, 293-94 (2005).

¶ 62 B. *Discussion*

¶ 63 The plaintiff maintains that Judge Maddox lacked authority to terminate attorney Stenn's appointment as independent administrator and to appoint Ms. Yario as special administrator.

The plaintiff concludes that since there was no one with legal capacity representing Dr. Yario before the court, the judgment is void. The plaintiff asserts that section 2-1008 of the Code of Civil Procedure (735 ILCS 5/2-1008 (West 2010) (the Code)), and section 2.1 of the Wrongful Death Act (740 ILCS 180/2.1 (West 2010) (the Act)) govern this issue.

¶ 64 Section 2-1008 of the Code provides in pertinent part as follows:

"(2) If a person against whom an action has been brought dies, and the cause of action survives and is not otherwise barred, his or her personal representative shall be substituted as a party. If no petition has been filed for letters of office for the deceased's

estate, the court, upon the motion of a person bringing an action and after notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action."

735 ILCS 5/1008 (b)(2) (West 2010)).

Section 2.1 of the Act provides in pertinent part as follows:

"In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action." 740 ILCS 180/2.1 (West 2010).

¶ 65 In denying the plaintiff's posttrial motion, the trial court found nothing in either section 2.1 of the Act or section 2-2008(b)(2) of the Code indicating the legislature's intention to prevent more than one administrator from representing a decedent's estate. In an effort to avoid any inconsistency between the two statutes, the trial court recognized attorney Stenn's and Ms. Yario's statuses as the independent and special administrators of the estate. Thus, each of them had the requisite legal capacity to defend Dr. Yario's estate at trial.

¶ 66 We note that in his March 10, 2011, order, Judge Maddox appointed Ms. Yario "special administrator" the term used in section 2.1 rather than "special representative," the term used in section 2-2008(b)(2). Section 2.1 governs the appointment of a special administrator in a wrongful death case. It does not apply because the present case is a medical malpractice case,

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not a wrongful death case. See *Bricker v. Borah*, 127 Ill. App. 3d 722, 724 (1984) ("[t]he Wrongful Death Act only applies where the act of the defendant causes the death of the person injured," not where the plaintiff is a living person); see also *Sepeda v. LaBarre*, 303 Ill. App. 3d 595, 598 (1999) (section 2.1 of the Act does not apply where the estate of the deceased is the defendant, rather than the plaintiff, in the lawsuit).

¶ 67 Likewise, the plaintiff's reliance on cases where the issue was decided under the Act do not support her argument that the judgment in this case is void. See *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 100 (under section 2 of the Act, the personal representative had the exclusive authority to bring an action for wrongful death; therefore the court lacked authority to appoint a special administrator under section 2.1 of the Act); *Kubian v. Alexian Brothers Medical Center*, 272 Ill. App. 3d 246 (1995) (under the Act, the trial court was not authorized to appoint the wife as special administrator in a wrongful death case; an estate containing assets had been opened for the deceased husband, and the daughter had been appointed executor).

¶ 68 We agree that section 2-1008(b)(2) applied in this case. In accordance with that section, the court should have substituted attorney Stenn, as the independent administrator of Dr. Yario's estate, for Dr. Yario in the malpractice case or, if the parties agreed, substituted Ms. Yario for attorney Stenn as the administrator of the estate, rather than terminating attorney Stenn's appointment. However, the fact that the proper procedure was not followed in this case did not result in a void judgment.

¶ 69 "A complaint filed against a dead person is void *ab initio*, a nullity, and does not invoke

the jurisdiction of the circuit court." *Bricker*, 127 Ill. App. 3d at 724. However, Dr. Yario was alive at the time the plaintiff filed her cause of action in this case. Under such circumstances, the judgment is voidable rather than void. See *Clafin v. Dunne*, 129 Ill. 241, 245 (1889); *City National Bank of Hoopeston v. Langley*, 161 Ill. App. 3d 266, 270 (1987) (the element of jurisdiction is the difference between a void judgment and a voidable judgment).

¶ 70 A party may waive the issue of a voidable judgment by its conduct in the lower court. In *Langley*, the defendants appealed the denial of their motion to vacate a judgment of foreclosure and sale on the grounds that the default judgment was entered prior to the expiration of the 30 days after the summons was served. After finding the judgment was voidable rather than void, the reviewing court determined that the defendants had waived the issue. The court noted that following the entry of the judgment of foreclosure, the defendants continued to negotiate with the Bank and sought additional time for making other living arrangements. The Bank relied on the defendants' statements as to when they would vacate the premises and delayed its efforts to have control over the property. The court held that the defendants' assent to the proceedings and the Bank's change in position to its detriment estopped the defendants from attacking the voidable judgment. *Langley*, 161 Ill. App. 3d at 270-71.

¶ 71 In *In re John C.M.*, 382 Ill. App. 3d 553 (2008), the reviewing court determined the juvenile court's failure to comply with time limitations rendered its order potentially voidable rather than void. Nonetheless, the court found the order was not voidable where the respondent mother supported and agreed to the delays. *John C.M.*, 382 Ill. App. 3d at 569-70.

¶ 72 In support of her posttrial motion, the plaintiff submitted the affidavit of her trial attorney,

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Robert A. Strelecky. Attorney Strelecky averred that attorney Stenn was appointed independent administrator by the probate judge, but he was then informed that the attorneys representing Dr. Yario wished to substitute Margaret Yario. Attorney Strelecky was agreeable to the substitution. Subsequently, he received a copy of the March 10, 2011, order signed by Judge Maddux appointing Ms. Yario special administrator of Dr. Yario's estate and terminating attorney Stenn's status as independent administrator. On April 28, 2011, at Judge Maddux's request, the attorneys for the parties attended a meeting in his chambers. Following the meeting, Judge Maddux entered an order vacating his March 10, 2011, order terminating attorney Stenn's status as independent administrator of Dr. Yario's estate. On June 8, 2011, the probate judge revoked attorney Stenn's letters of office and appointed Ms. Yario and Robert F. Yario co-administrators of Dr. Yario's estate.

¶ 73 The plaintiff maintains that she objected promptly to the March 10, 2011, order by raising the error in her posttrial motion. She points out that attorney Strelecky agreed only to substitute Ms. Yario for attorney Stenn whereas Judge Maddox's order terminated attorney Stenn's appointment and appointed Ms. Yario as special administrator of Dr. Yario's estate.

¶ 74 The record does not support the plaintiff's claim that her objection to Ms. Yario's status as the special administrator was timely. The parties' jury instructions were prepared and discussed with the trial court prior to the conclusion of the trial. The plaintiff's jury instruction No. 15 identified Ms. Yario as the special administrator of Dr. Yario's estate, indicating that the plaintiff knew that Ms. Yario was representing Dr. Yario's estate as the special administrator but failed to object until after the trial court had entered judgment on the jury's verdict.

¶ 75 The judgment in this case was voidable not void. By waiting until her posttrial motion to raise her objection to the judgment, the plaintiff forfeited her objection to the voidable judgment.

¶ 76 II. Manifest Weight of the Evidence

¶ 77 The plaintiff contends that she should receive a new trial because the jury's verdict was against the manifest weight of the evidence.

¶ 78 A. *Standard of Review*

¶ 79 We review a trial court's denial of a motion for a new trial based on the manifest weight of the evidence for an abuse of discretion. See *Redmond v. Socha*, 216 Ill. 2d 622, 651 (2005). An abuse of discretion will be found only if the trial court's ruling was arbitrary, unreasonable, ignored recognized principles of law, or if no other reasonable person would take the position adopted by the court. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 80 B. *Discussion*

¶ 81 The plaintiff relies on Dr. Flanigan's testimony that Dr. Yario deviated from the standard of care in his treatment of her. The plaintiff also points to the discrepancies between Dr. Yario's post-operation notes and his deposition testimony four years later. In particular, the plaintiff points to the lack of any evidence that Dr. Yario performed a second bypass. The plaintiff asserts that her trial testimony that Dr. Yario never informed her that her leg could not be saved was uncontradicted.

¶ 82 Dr. Flanigan testified that Dr. Yario violated the standard of care by failing to perform a retrograde thrombectomy. The plaintiff argues that Dr. Curran's testimony that he personally never performed retrograde thrombectomies did not establish that a retrograde thrombectomy

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was not required by the standard of care. See *Schmitz*, 368 Ill. App. 3d at 455-56 (personal practices of the expert witness are not relevant to and are insufficient to establish the standard of care).

¶ 83 The record does not support the plaintiff's argument. Dr. Curran did not rely solely on his own personal practice. On redirect examination, Dr. Curran was asked to explain why the standard of care did not call for retrograde thrombectomies. He testified as follows:

"These blood vessels are one to two millimeters in size - - or two millimeters in size roughly. They ***don't handle being dissected and have a catheter placed up them and dragging the catheter back down.

So in general, when we get down to the ankle, these vessels are very small, two millimeters in diameter, and very fragile. So retrograde embolectomies or reverse embolectomies are just not standard practice."

¶ 84 Dr. Flanigan testified that Dr. Yario deviated from the standard of care when he failed to do a completion angiogram. According to his deposition testimony, Dr. Yario decided not to do a completion angiogram because of the risk to the plaintiff's kidneys posed by the four or five angiograms she had already undergone. The plaintiff points out that she had only undergone two angiograms. Therefore, Dr. Curran's opinion that Dr. Yario's decision not to do a completion angiogram was reasonable was based on incorrect information and did not support the verdict in this case.

¶ 85 Dr. Yario was concerned over the danger to the plaintiff's kidneys from the amount of dye placed in her system from the angiograms she had undergone. In addition, he had gotten a good

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Doppler pulse, and a pulse was much better than an angiogram. "But if I had poor flow, I would have gotten another angio. But I'm not even sure if I didn't. But what was that going to show? It was already open." Dr. Yario further explained that he "could have a good angiogram *** but no pulse. I still would have to take it down. But I had a pulse. I saw no reason to give her more dye."

¶ 86 On direct examination, Dr. Curran explained that completion angiograms were not required unless the surgeon was unhappy with an element of the procedure such as the flow to the artery. On cross-examination, Dr. Curran was asked whether a completion angiogram was a more reliable method of determining whether the blood flow was restored than listening with a Doppler, and he responded as follows:

"I would say there's - - in general, I would agree with you. I think, though, that Doppler, again, gives you an idea of the flow characteristics: Is it a strong signal, is it a weak signal, whereas a picture obviously is a static image and you're not necessarily going to know how well the flow is. You can see whether there's flow or not, but you don't get an idea of how good the flow is.

Q. With the Doppler?

A. No, with an angiogram.

You get an idea of what the vessels look like. Like I said, you get a picture rather than just a physiologic measurement, which is the Doppler.

Q. So in your opinion from what you reviewed in these records, the - - Dr. Yario,

with the Doppler, wherever he placed it, that was sufficient within the standard of care for him to decide I've done all I can; I can conclude my procedure; there's nothing more than [*sic*] can be done.

A. Yes."

¶ 87 While Dr. Yario was concerned about the amount of dye in the plaintiff's system, it is clear that his decision not to perform a completion angiogram was based on the Doppler pulse he detected. In opining that Dr. Yario's decision was reasonable, Dr. Curran explained that the Doppler provided more evidence of the characteristics of the flow than the angiogram did and that where the surgeon, in this case Dr. Yario, was satisfied with the results of the procedure, the standard of care did not require a completion angiogram.

¶ 88 We conclude that Dr. Curran's opinion Dr. Yario's decision not to do a completion angiogram was reasonable was not based on incorrect information as to how many angiograms the plaintiff had undergone.

¶ 89 The plaintiff argues that the record does not support Dr. Curran's opinion that it was reasonable for Dr. Yario to stop the procedure when he did because he was satisfied with the result. The plaintiff maintains that the evidence that the recovery room nurse could not detect a pulse in the plaintiff's left posterior tibial pulse immediately after surgery was uncontradicted.

¶ 90 We disagree. Dr. Curran testified that the nurse's note conflicted with another notation on the plaintiff's chart that the pedal pulses, detected by the Doppler were "fleeting" since the posterior tibial was a pedal pulse. In addition, the internist's note, charted about two hours after the surgery, stated that the plaintiff's foot looked good, and the plaintiff had sensation in her foot.

¶ 91 The plaintiff maintains that Dr. Yario's post-operation notes did not support his deposition testimony that he performed a second bypass. She argues that neither Dr. Yario nor Dr. Curran could explain the inconsistency between finding a good blood flow but no Doppler signal following the first bypass. The plaintiff maintains that, in denying her request for a new trial, the trial court ignored Dr. Flanigan's testimony that Dr. Yario had cut off the anterior tibial artery leaving no way to get a blood flow to that artery and that there was nothing in the medical record indicating that Dr. Yario had performed a second bypass.

¶ 92 There was no dispute that in his post-operation notes, Dr. Yario did not use the term "bypass" to describe the procedure he used after the angiogram revealed that the posterior tibial artery was still dissecting. However, the anesthesiologist's report from the plaintiff's surgery noted "popliteal posterior tibial bypass graft with vein." According to Dr. Curran, the anesthesiologist would have received that information from Dr. Yario. Dr. Curran opined that the anesthesiologist's report, Dr. Yario's deposition testimony and the 21-centimeter medial incision noted in the pathology report from the amputation surgery were all consistent with a second bypass having been performed. Dr. Curran explained in pertinent part as follows:

*** I think that - - and also what I would say from Dr. Yario's deposition that, you know, that's the description of the procedure he performed *** what's written on the anesthesiologist report. And that's consistent with the incision length they found when the amputation was performed."

Dr. Curran also opined that the fact that the plaintiff underwent fasciotomy on both sides meant that the 21-centimeter incision was due more likely than not to bypass surgery rather than to the

fasciotomy. A fasciotomy usually consists of small incisions, whereas the plaintiff had a 21-inch incision that went straight down her leg.

¶ 93 The plaintiff argues that the opinions that her leg could not have been saved were based only on hindsight. She maintains Dr. Yario never told her prior to surgery that her leg could not be saved, and after causing the dissection, Dr. Yario merely attempted to repair the damage he had caused. Then, following the surgery, he abandoned the plaintiff as a patient.

¶ 94 While in her deposition testimony, the plaintiff stated that Dr. Yario told her he could not save her leg, it is unclear when that conversation took place. Nonetheless, in his deposition testimony, Dr. Yario testified that he had told the plaintiff's family members prior to the surgery that, based on the angiogram pictures, there was a high chance the leg would be lost. Because the plaintiff had been given morphine, her son, Paul, signed the consent for surgery. The plaintiff failed to call Paul or any other members of her family to contradict Dr. Yario's deposition testimony. See *Niewold v. Fry*, 306 Ill. App. 3d 735, 744-45 (1999) (in a negligence action, the burden of proving negligence is on the plaintiff; it is not the defendant's burden to disprove negligence). Therefore, the plaintiff failed to establish that the opinions that her leg could not have been saved were based solely on hindsight.

¶ 95 Dr. Yario testified he saw the plaintiff every day after her surgery and that he followed the plaintiff's progress until the decision was made to amputate her leg. He also testified he believed that he had done all he could for her in the surgical procedure.

¶ 96 A party's request for a new trial should not be granted unless, after weighing the evidence, the trial court determines that the verdict is contrary to the manifest weight of the evidence.

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Maple v. Gustafson, 151 Ill. 2d 445, 454 (1992). For the verdict to be against the manifest weight of the evidence, the opposite conclusion must be clearly evident or the jury's findings were unreasonable, arbitrary and lacked any evidentiary support. *Maple*, 151 Ill. 2d at 454.

¶ 97 A review of the record reveals that the plaintiff's evidence is far from contradicted, and Dr. Yario's evidence is not as unsatisfactory as plaintiff would have us believe. Instead, each of the plaintiff's arguments required resolution of the conflicts in the evidence .

¶ 98 It is the jury's role to resolve conflicts in the evidence, determine the credibility of the witnesses and to decide the weight to be given each witness's testimony. *Martinez v. Elias*, 397 Ill. App. 3d 460, 471 (2009). "As a reviewing court, it is not within our power to 'usurp the function of the jury and substitute [our] judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.' " *Martinez*, 397 Ill. App. 3d at 471 (quoting *Maple*, 151 Ill. 2d at 452-53).

¶ 99 The jury heard and considered the testimony of the expert witnesses, Drs. Flanigan and Curran. Based on the same evidence, they each reached a different conclusion as to whether Dr. Yario violated the standard of care in his treatment of the plaintiff. The outcome of this case was based on the jury's credibility determination, and we will not disturb the jury's verdict merely because it could have made a different credibility determination or drawn different inferences of fact. *Niewold*, 306 Ill. App. 3d at 748.

¶ 100 The jury's acceptance of Dr. Curran's opinion over that of Dr. Flanigan's was not unreasonable, arbitrary and had a basis in the evidence. Therefore, the verdict for Dr. Yario was not against the manifest weight of the evidence.

¶ 101

III. Motion *in limine*

¶ 102 The plaintiff contends that the trial court erred when it denied her motion *in limine* seeking to bar the introduction of evidence of her unrelated medical conditions.

¶ 103

A. *Standard of Review*

¶ 104 The abuse of discretion standard applies to our review of the trial court's ruling on a motion *in limine*. *Martinez*, 397 Ill. App. 3d at 467. An abuse of discretion will be found only if the trial court's ruling was arbitrary, unreasonable, ignored recognized principles of law, or if no other reasonable person would take the position adopted by the court. *Schmitz*, 368 Ill. App. 3d at 452.

¶ 105

B. *Discussion*

¶ 106 "The denial of a motion *in limine* does not in itself preserve an objection to disputed evidence that is introduced later at trial." *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002). When the court rules on a motion *in limine* prior to trial, the ruling is interlocutory and remains subject to reconsideration by the court throughout the trial. *Guski v. Raja*, 409 Ill. App. 3d 686, 695 (2011). In order to preserve the denial of the motion for appellate review, the party must also make a contemporaneous objection when the evidence is introduced to allow the trial court to reconsider its earlier ruling. *Guski*, 409 Ill. App. 3d at 695. Failure to make a contemporaneous objection results in forfeiture of the alleged error on appeal. *Guski*, 409 Ill. App. 3d at 695.

¶ 107 The plaintiff does not maintain that she objected to the defendants' references to her unrelated medical conditions. Rather, she suggests that the trial court made a definitive ruling when it denied her motion *in limine*, thus rendering any objection unnecessary. That argument

has been considered and rejected by this court. See *Guski*, 409 Ill. App. 3d at 696 (rejecting the holding in *Spyrka v. County of Cook*, 366 Ill. App. 3d 156 (2006), that any ruling on the merits of the motion *in limine* is not interlocutory and no further objection is necessary). Moreover, in denying the plaintiff's motion, the trial court told the plaintiff's attorney to "raise it at trial." The court also made it clear that it was open to further discussion on the motion prior to a witness's testimony.⁶ Nonetheless, the plaintiff failed to make any objection once the trial commenced.

¶ 108 The plaintiff argues that she was denied a fair trial because the defendants' references to her unrelated illnesses during the trial suggested to the jury that her prior illnesses and not Dr. Yario's treatment necessitated the amputation of her leg. We disagree.

¶ 109 Several portions of the record cited by the plaintiff to support her argument do not mention her unrelated medical conditions. Moreover, in his opening argument, the plaintiff's attorney referred to the plaintiff's earlier visits to Holy Cross "for some other unrelated medical issues" and told the jury that the plaintiff had "some other disease processes which you'll hear that really aren't related to why we're here." Then, on direct examination of the plaintiff, her attorney again referenced her unrelated medical conditions stating, "I know there were some health issues you've had over the years" prior to soliciting the plaintiff's testimony that she was in good health at the time she was treated by Dr. Yario. See *Simmons*, 198 Ill. 2d at 569 (alleged error in admitting evidence was forfeited where the plaintiffs not only failed to object but introduced the evidence themselves).

⁶*Spyrka* and *Guski* were decided by different divisions of the First District Appellate Court.

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¶ 110 Based upon our review of the record, we find no reasonable basis to excuse the plaintiff's failure to object at trial, and the error is forfeited. See *Guski*, 409 Ill. App. 3d at 697.

¶ 111 IV. Holy Cross

¶ 112 The plaintiff contends that a new trial for Dr. Yario requires that she be awarded a new trial as to Holy Cross. Since we have determined that the plaintiff is not entitled to a new trial in this case, we need not consider this issue.

¶ 113 CONCLUSION

¶ 114 The judgment of the circuit court is affirmed.

¶ 115 Affirmed.